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LIABILITY OF A BANK TO THE MAKER OF A CHECK FOR THE WRONGFUL DISHONOR THEREOF.

The relation of a bank and its depositor is that of debtor and creditor, but it differs from the ordinary relation of debtor and creditor in this, that the bank impliedly undertakes to honor checks drawn upon it by a depositor up to the amount of his deposit. No other debtor impliedly undertakes to honor orders drawn upon him by his creditor,[1] though a debtor may expressly agree to do so. In the case of banks and depositors, and in the case of an express undertaking by any other debtor, an unjustifiable refusal to honor a check or order drawn by the creditor is a breach of legal duty for which an action for damages will lie. Even in those jurisdictions where the payee or holder of a check may maintain an action upon it against the bank, the maker has also an action for any damages sustained by him in consequence of the wrongful dishonor.[2]

What constitutes a wrongful dishonor need not now detain us. Death, bankruptcy, a garnishee order, or the like, may revoke or suspend the authority of the bank to

[1] In some continental countries there is such an implied undertaking on the part of ordinary mercantile debtors to honor bills drawn by creditors. See Chalmers' Bills of Exchange (5th ed.) p. 182.

[2] National Bank of Lebanon *v.* Boles (1890) 12 Ky. L. Rep. 422.

honor the check. Moreover, the deposit upon which the check is drawn may have been made so brief a time before the check is presented that the bank could not, in the exercise of reasonable banking diligence, have made the entries necessary to enable the paying teller to ascertain the true state of the accounts. This is a question to be determined by the trier of the facts.[1] Further, the bank may itself have an off-set or lien which will justify it in refusing to honor checks to its own detriment.[2] These and other defenses may be set up by way of justification or excuse in an action against the bank for a wrongful dishonor.[3]

The action accruing to the drawer upon the wrongful dishonor of his check may be brought either in *assumpsit* for the breach of the implied promise, or in case for the breach of an obligation springing from the contract, but, in legal effect, otherwise independent of it. Since the depositor has his choice of remedies in such a case it becomes important to determine how he will fare under either the one or the other.

If the action is brought for a breach of contract, the plaintiff may recover (1) at least nominal damages,[4] or (2) upon proper allegations and proof, such special damages as are shown to be the natural and probable consequences of the breach, but not damages which are too remote.[5]

What damages are too remote under this rule must be determined according to the usual doctrines applicable to damages for breach of contract. The amount which the drawer is compelled to pay the holder as statutory damages on the return of a dishonored bill, protest fees and costs, have been held to be proper elements of damages in an action for breach of the contract to accept or pay.[6] In another case [7] the plaintiff recovered from his agent, who

[1] Marzetti *v.* Williams (1830) 1 B. & Ad. 415; Rolin *v.* Steward (1854) 14 C. B. 595. [2] Mt. Sterling N. B. *v.* Green (1896) 99 Ky. 262.

[3] See Morse on Banks, § 459.

[4] Burroughs *v.* Tradesmen's Bank (1895) 87 Hun, 6.

[5] Urquhart *v.* M'Iver (N. Y. 1809) 4 Johns. 103; Riggs *v.* Lindsay (1813) 7 Cranch, 500; Boyd *v.* Fitt (1862) 14 Ir. C. L. 43; Prehn *v.* Royal Bank (1870) L. R. 5 Ex. 92; Citizens' N. B. *v.* Importers & Traders' Bank (1890) 119 N. Y. 195; Brooke *v.* Tradesmen's Bank (1893) 69 Hun, 202.

[6] Urquhart *v.* M'Iver, *supra*; Riggs *v.* Lindsay, *supra*.

[7] Boyd *v.* Fitts, *supra*.

in breach of contract permitted a bill drawn by the plaintiff to be dishonored, the damages to his trade at Glasgow (where the dishonor occurred), at Dublin (where the dishonored bill was returned), and also for the loss of an Australian agency although it did not appear that the defendant knew of the existence of such an agency. The court had doubt about the last element of damage but allowed the verdict to stand upon the authority of Rolin *v.* Steward,[1] which, however, was a case in tort and not in contract. The court expressed the opinion that Hadley *v.* Baxendale[2] "is not capable of meeting all cases," and that the question is, within limits, one for the jury whether the damages are the natural and probable consequences of the breach. In another case[3] the plaintiff recovered commissions and telegraph fees paid by him in an effort to avoid the consequences of the breach and save his credit. In the event of the payment of the draft by the drawer he may recover from the bank simply the amount of the draft in the absence of the allegation and proof of other special damages.[4] In a case where the plaintiff alleged that in consequence of the dishonor of his bank paper certain creditors had a right to, and did, attach his stock in trade and that his business was thereby ruined, it was held that these alleged consequences were too remote, as the defendant could not reasonably foresee them as a natural and probable consequence of the breach, and that the only damage fairly to be foreseen was measured by the amount of the bank note, with interest and costs. If the dishonored check is afterward paid by the bank it seems that in an action *ex contractu* the drawer can recover only nominal damages for the wrongful dishonor.[5]

While there have been some variations, due to a failure to distinguish between the action *ex contractu* and the action *ex delicto*, the rules of Hadley *v.* Baxendale have been generally applied in actions for the breach of the contract to honor commercial paper. In any event nominal damages may be recovered, and such further special damages as might reasonably be supposed to be contemplated.

[1]14 C. B. 595. [2]9 Exch. Rep. 341. [3]Prehn *v.* Royal Bank, *supra.*
[4]Citizens' N. B. *v.* Importers & Traders' Bank, *supra.*
[5]Burroughs *v.* Tradesmen's Bank, *supra.*

Where the check is afterward paid by the bank only nominal damages are recoverable, together with any fees or costs attendant upon dishonor and paid by the drawer. Where the check or other instrument remains unpaid the damage is the amount of the instrument, together with interest and costs. Expenses reasonably incurred to avoid the consequences of the breach may properly be regarded as within the contemplation of the parties. Whether injury to credit may be so regarded is more doubtful. Aside from the case of Boyd *v.* Fitts[1] there seems to be no authority for allowing recovery for such injury, and that case is expressly rested upon Rolin *v.* Steward,[2] in which the action sounded in tort.

Two different theories have been advanced as to the nature of the tort committed by a bank in refusing, when in funds, to honor a depositor's check. The general theory is that it is an unnamed tort analogous to a slander of title or disparagement of goods or credit. "It is a species of slander of credit for a banker to refuse to honor the check of his customer who has money on deposit subject to call."[3] "A man's reputation may also be injured by the deed or action of another without his using any words; and for such an injury he has an action on the case. * * * A banker having in his hands sufficient funds belonging to his customer dishonors his check; the customer may recover substantial damages, without proof of special damage; for it is clear that such an act must injure the customer's reputation for solvency."[4] "It is a discredit to a person, and therefore injurious in fact, to have a draft refused payment. * * * It is an act particularly calculated to be injurious to a person in trade."[5] The other theory is that a bank is a quasi-public agency and that it is in accord with public policy to hold such an institution liable upon a duty created by the law and to award substantial damages for its breach.[6] The difficulty with this theory is that it is based upon the notion that this particular tort can be committed only by a bank, whereas it is clear that

[1] 14 Ir. C. L. 43. [2] 14 C B. 595.

[3] Cooley on Torts, 2d ed. p. 238, note. See also Bishop on Non-Contract Law, § 491. [4] Odgers on Libel and Slander, 3d ed. p. 13.

[5] Lord Tenterden in Marzetti *v.* Williams (1830) 1 B. & Ad. 415.

[6] Patterson *v.* Marine N. B. (1889) 130 Pa. St. 419, 433.

any person under an obligation to honor paper may produce the same injury to credit by refusing to perform the obligation.[1] Moreover a banker may engage in business without any public franchise and it is even a question whether the state can interfere with the common right to engage in banking.[2] It seems, therefore, that the correct theory of this tort is that it is a false representation as to credit made by a person who is under an express or implied promise to make a true representation. The breach of the promise is also a breach of the broader legal obligation not to make a false representation about another, or another's business credit, calculated to influence the conduct of third persons towards him to his damage.

Whatever the true theory of the wrong may be it is well settled that in an action *ex delicto* for the redress of the wrong substantial general damages may be recovered. In an action *ex contractu* the plaintiff is limited to nominal damages unless he pleads and proves special damages. In the action *ex delicto* the plaintiff may recover substantial damages, certainly if he is a trader or has a general commercial character or reputation, without alleging or proving any special damages. The rules governing damages in an action in tort by a depositor for the wrongful dishonor of his check by a bank may be briefly stated as follows:

(1) The depositor, if a trader, may recover substantial temperate damages.[3]

(2) The depositor may recover such special damages as he alleges and proves, provided such damages be the natural and probable consequences of the defendant's wrongul act.[4]

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[1] See Boyd *v.* Fitts, *supra.* [2] State *v.* Scougal (1892) 3 So. Dak. 55.

[3] Marzetti *v.* Williams (1830) 1 B. & Ad. 415; Rolin *v.* Steward (1854) 14 C. B. 595; Larios *v.* Bonany y Gurety (1873) L. R. 5 P. C. 346; Patterson *v.* Marine N. B. (1889) 130 Pa. St. 419; Schaffner *v.* Ehrman (1891) 139 Ill. 109; Bank of Commerce *v.* Goos (1894) 39 Neb. 437; Atlanta N. B. *v.* Davis (1895) 96 Ga. 334; Svendsen *v.* State Bank (1896) 64 Minn. Mann. 40; First N. B. *v.* Railsback (1899) 58 Neb. 248; Davis *v.* Standard N. B. (1900) 50 N. Y. App. Div. 210; J. M. James Co. *v.* Continental Bank (1900) 105 Tenn. 1; Fleming *v.* Bank of New Zealand [1900] A. C. 577 (P. C.).

[4] Larios *v.* Bonany y Gurety, *supra;* Bank *v.* Goos, *supra;* Fleming *v.* Bank, *supra;* J. M. James Co. *v.* Continental Bank, *supra;* Doria *v.* Bank (1879) 5 Vict. L. R. (Law) 393; Robey *v.* Oriental Bank (1879) 2 S. C. R. N. S., New So. Wales, 56.

(3) If wilfulness and malice be proved damages may be recovered for injury to feelings and the anxiety and humiliation attendant upon the wrongful dishonor,[1] or, perhaps, punitive damages.[2]

(4) If the depositor be not a trader it seems he cannot recover for general damages to his credit, but only for such special damages as he alleges and proves.[3]

Marzetti *v.* Williams[4] is a leading case upon these points, although but for the gloss upon it in Rolin *v.* Steward[5] it might easily have become a misleading case. The plaintiff recovered one shilling as damages for the wrongful dishonor of his check by his bankers. The error which led to the dishonor was speedily discovered and the check was paid the day following its dishonor. The defendant's counsel contended that the action was in tort and that it was not sustainable without proof of special damage. The court seemingly adopts the view that the action is in tort (although it says that whether it is in tort or *assumpsit* is immaterial), but not the view that special damages must be proved. The court, however, speaks throughout of the plaintiff's right to recover "nominal damages." Now that would be very misleading were it not for the fact that in the later case of Rolin *v.* Steward this is explained to mean that the plaintiff may recover without proof of special damages, and since the jury had fixed the damages at one shilling, a nominal sum, the plaintiff is entitled to his verdict. Williams, J., says: "In that case, the check was paid on the following day; and that may account for the shilling damage." Equally, if the jury had given the plaintiff a substantial temperate sum he could have retained that also. Adopting this view of the precedent the court in Rolin *v.* Steward allowed a verdict for substantial damages under precisely similar circumstances, although at the suggestion of the court the plaintiff consented to reduce it from 500*l.* to 200*l.* The charge sustained in Rolin *v.* Steward was that the jury "ought not to limit their verdict to nominal damages, but should give the plaintiff such temperate damages as they should judge to be a reasonable compensation for

[1] Davis *v.* Standard N. B., *supra.* [2] Patterson *v.* Marine N. B., *supra.*
[3] Bank *v.* Milvain (1884) 10 Vict. L. R. (Law) 3. [4] 1 B. & Ad. 415.
[5] 14 C. B. 595.

the injury he must have sustained from the dishonor of his checks." On the appeal the court said: "Where it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and probable consequences which must result to the plaintiff from the defendant's breach of contract; just as in the case of an action for slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."

In the Pennsylvania case,[1] the trial judge charged the jury that they might give substantial damages, and if they found that the defendant acted unnecessarily and unreasonably they might give punitive damages. This was sustained by the Supreme Court, although as the damages did not seem to be more than substantially compensatory the question of punitive damages was not much considered. To the same effect are other recent cases.[2]

It seems that such general substantial damages cannot be awarded unless the plaintiff is alleged and proved to be a trader. The doctrine laid down in Rolin *v.* Steward was limited to traders, and in a colonial case[3] the point was expressly decided that a farmer whose check was wrongfully dishonored could not recover except upon proof of special damages. It was said: "A plaintiff who is not a trader has no mercantile character and cannot recover more than nominal damages unless he proves special damages. There is no presumption legitimately deducible that a person who is not a trader suffers substantial damage by the dishonor of his check." Other cases impliedly sustain the same doctrine.[4]

The plaintiff may, however, allege and prove special damages, provided they be the natural and probable consequence of the wrongful dishonor. But he cannot give in evidence facts intended to prove special damages, unless he

[1] Patterson *v.* Marine N. B., 130 Pa. St. 419.

[2] Schaffner *v.* Ehrman, 139 Ill. 109; Atlanta N. B. *v.* Davis, 96 Ga. 334; Svendsen *v.* State Bank, 64 Minn. 40; First N. B. *v.* Railsback, 58 Neb. 248. [3] Bank *v.* Milvain, 10 Vict. L. R. 3.

[4] It is usualy said that the averment, "plaintiff is a trader," supplies the lack of allegation that he suffered special damages. Schaffner *v.* Ehrman, 139 Ill. 109; J. M. James Co. *v.* Bank, 105 Tenn. 1.

has alleged these in his complaint or statement of his case, since the defendant is entitled to be advised in advance of a purpose to prove special damages. This is made clear in two recent cases. In one[1] the allegation was of general loss of trade, and the plaintiff sought to prove the loss of particular customers. It was held that the evidence was properly rejected, since there had been no averment of special damages. In the same case it was held to be error to exclude evidence of general impairment of credit and custom or to confine recovery to nominal damages. In another recent case[2] it appears from the fuller report of the facts in the colonial report,[3] that the plaintiff had not alleged special damages, but at the trial sought to prove that one or two particular persons who had been in the habit of dealing with him had ceased to do so in consequence of the dishonor of the checks, and that the trial judge admitted this evidence over the defendant's objection. The New Zealand Court of Appeal held such proof inadmissible unless pleaded. The Privy Council evidently adopts the same view, and directs a new trial unless the verdict for general damages be reduced from 2,000*l.* to 500*l.*

Special damages may include any items of loss not too remote. In one case[4] the plaintiff recovered, in addition to general substantial damages, the expenses of journeys to the place of trial and while at the trial, and for the loss of some merchandise which he had felt obliged to sell in order to pay the dishonored paper. It was held that the last two items were too remote. His verdict for $5,000 was reduced to $2,500. In another case[5] the plaintiff gave a check for taxes, and, upon its dishonor, was arrested for obtaining a tax receipt under false pretences. He alleged the arrest, and the disgrace and humiliation attending it, as elements of special damages; but it was held that these were not the natural and probable consequences of the dishonor.

Special damages may, of course, be alleged and proved

[1] J. M. James Co. *v.* Bank, 105 Tenn. 1.

[2] Fleming *v.* Bank of New Zealand [1900] A. C. 577 (P. C.).

[3] 18 New Zealand Rep. 1.

[4] Larios *v.* Bonany y Gurety, L. R. 5 P. C. 346.

[5] Bank *v.* Goos, 39 Neb. 437.

where no general substantial damages could be awarded. Thus, if the plaintiff has lost his mercantile character by himself permitting his checks to be dishonored for want of funds to meet them, he may nevertheless allege and prove special damages as the result of a wrongful dishonor by the bank.[1] So a trader, in fact insolvent, may show that but for the wrongful dishonor he could have made satisfactory arrangements with his creditors.[2]

Whether punitive damages may be recovered seems not to have been much considered. There is a *dictum* to the effect that they may in cases of wilful or malicious dishonor.[3] Such damages are allowed in aggravated cases of defamation.[4] It would seem that a wilful and malicious purpose to injure the credit of a depositor by dishonoring his checks might properly be rebuked by awarding punitive damages against the wrongdoer.

The disgrace and humiliation, and the mental anxiety suffered by a depositor in consequence of the wilful and malicious dishonor of his checks may, perhaps, be regarded as a natural and probable consequence of such intentional wrong. This was so held in a recent decision.[5] If the wrong consisted in a defamatory attack upon his personal reputation, this would be clear. Yet a trader may suffer as much humiliation and anxiety in consequence of an attack upon his commercial reputation as in case of a like attack upon his private character.

Whether similar doctrines are applicable to the failure of a bank to pay a bill or note expressly made payable at the bank by a depositor, depends upon the question whether there is any implied undertaking on the part of a bank to pay such paper or any implied request from the depositor that it should do so. It is sometimes said that when a promissory note is made payable at a particular bank, where the maker keeps a deposit, it is equivalent to a check drawn by him upon the bank.[6] It is held, on the other hand, that so far

[1] Doria *v.* Bank (1879) 5 Vict. L. Rep. (Law) 393.

[2] Robey *v.* Oriental Bank (1879) 2 Sup. C. Rep. N, S., New South Wales, 56. [3] Patterson *v.* Marine N. B. 130 Pa. St. 419.

[4] 1 Sedg. on Dam. § 377; Odgers on L. & S. 3d ed. p. 339.

[5] Davis *v.* Standard, N. B., 50 App. Div. 210.

[6] Indig *v.* National City Bank (1880) 80 N. Y. 100. See 2 Morse on Banks, §§ 556–557.

from there being any obligation on the part of a bank to pay out of a depositor's account a note or bill of his made payable there, the bank has no implied authority to make such payment and pays at its peril in the absence of express authority.[1] This question is met in the Negotiable Instrument Law[2] by the provision that, " where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." It would seem, therefore, that the maker or acceptor who makes or accepts negotiable paper payable at a bank where he has a deposit sufficient to cover the amount of the paper would, under this statute, have an action for damages against the bank in case the latter unjustifiably refused to pay. The action in one case[3] was by a maker of a promissory note payable at a bank where he had a sufficient deposit to meet the note, but the case was decided upon another point, the court expressly declining to consider whether such an action would lie. Most of the cases that have heretofore dealt with this problem have considered only the question whether the bank may properly pay such paper, not whether it is under a legal obligation to do so.

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[1]Grissom *v.* Commercial N. B. (1889) 87 Tenn. 350. Most of the authorities *pro* and *con* are collected and discussed in this case.

[2]N. Y. Neg. Inst. Law, § 147 (original, § 87).

[3]Brooke *v.* Tradesmen's N. B., 69 Hun, 202.